

**BEFORE THE TAX DIVISION
ALASKA DEPARTMENT OF REVENUE**

Millennium Games

**Department Discretionary Review
Of Wireless Restriction On
Bingo Equipment**

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DECISION ON REVIEW

On July 23, 2001, the Department of Revenue, Tax Division Gaming Unit (Gaming Unit) responded to a request by Millennium Games (Millennium) to market certain Bingo equipment in Alaska. Millennium is neither an approved operator nor permittee conducting gaming activities in Alaska and therefore has no standing to seek approval of gaming devices or to appeal actions of the division in gaming matters. In its discretionary response, the Gaming Unit listed a number of conditions and restrictions that the equipment would have to meet in order to be authorized as electronic bingo paper under the authority of AS 05.15.180(a) and 15 AAC 160.995(a)(3). Millennium modified its equipment to meet the requirements of the Gaming Unit, but questioned a restriction prohibiting wireless radio communication. The Gaming Unit authorized the use of the machines as modified, and Millennium was allowed to seek a very limited review of the wireless restriction. This decision follows that discretionary and very narrow scope of review. The review process included a number of telephone contacts with Millennium representatives, consideration of written materials provided by Millennium, and discussions in two in-person conferences. This decision incorporates all written communications, representations and material provided as part of the review.

The result of our review is that the use in bingo games of operator or permittee provided electronic devices by a bingo player is not expressly authorized by statute but may be authorized by regulation as electronic bingo paper, but only to the extent allowed by the department. The department has the discretion to prohibit the use of all machines, or to attach conditions to the permitted use and operation of machines. Nevertheless, wireless communication may be used to transmit called numbers to specifically approved electronic bingo paper.

ISSUES

- 1) Is the use of an electronic device by a bingo player authorized under the gaming laws?
- 2) Does the regulation definition of electronic bingo paper allow the use of wireless communication?

LAW

Alaska Statutes

Sec. 05.15.010. Department of Revenue to administer chapter. The Department of Revenue shall administer this chapter.

Sec. 05.15.060. Regulations. (a) The department shall adopt regulations under AS 44.62 (Administrative Procedure Act) necessary to carry out this chapter. . . .

Sec. 05.15.110. Authorized activities a privilege. The activities specified in AS 05.15.100 may be permitted as a privilege and do not confer a right upon any person to conduct the activities.

Sec. 05.15.130. Department may impose additional requirements. The department may supplement the definitions of qualified organizations and activities by regulations adopted under this chapter adding to the definitions additional requirements that the department considers necessary for the best interests of the public or for the proper administration of this chapter.

Sec. 05.15.180. Limitations on authorized activity. (a) This chapter does not authorize the use of playing cards, dice, roulette wheels, coin-operated instruments or machines, or other objects or instruments used, designed, or intended primarily for gaming or gambling or any other method or implement not expressly authorized by the department.

(b) With the exception of raffles, lotteries, bingo games, pull-tab games, race classics, rain classics, goose classics, mercury classics, deep freeze classics, dog mushers' contests, snow machine classics, mushing sweepstakes, canned salmon classics, salmon classics, and kin salmon classics, an activity may not be licensed under this chapter unless it existed in the state in substantially the same form and was conducted in substantially the same manner before January 1, 1959. A snow machine classic may not be licensed under this chapter unless it has been in existence for at least five years before the licensing.

Sec. 05.15.640. Restrictions on Use of Broadcasting. (a) a person may not use broadcasting to promote or conduct a charitable gaming activity under this chapter. . . . In this subsection, "broadcasting" includes television and radio transmission by 2,500 megahertz, microwave video and audio programming, slow-scan television programming, and programming via satellite, cable, teletype, or facsimile transmission and distribution methods.

Sec. 05.15.690. Definitions. In this chapter

(3) "bingo" means a game of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, five or more in one line, the holder covering numbers when objects similarly numbered are drawn from a receptacle, and the game being won by the person who first covers a previously designated arrangement of numbers on the card;

Alaska Administrative Code

15 AAC 160.570. Bingo Equipment. (a) "Bingo equipment" means equipment that is made or sold for use in bingo games permitted under AS 05.15. Unless otherwise specified, "bingo equipment" includes a machine or other device from which balls are withdrawn to determine the letters and numbers to be called, the balls themselves, a bingo card and other devices commonly used in the direct operation of a bingo game.

(b) In conducting a bingo game, a permittee or operator shall use

(1) a device which mixes and allows for random withdrawing of balls to determine the letters and numbers to be called; the device must be constructed in a manner that

(A) allows players to view the mixing action of the balls; and

(B) prevents its operation from being interrupted so as to change the random placement of balls at the exit receptacle of the device, except as provided under 15 AAC 160.590(k);

(2) a set of 75 balls bearing the numbers one through 75; balls one through 15 must bear the letter "B"; balls 16 through 30 must bear the letter "I"; balls 31 through 45 must bear the letter "N"; balls 46 through 60 must bear the letter "G"; balls 61 through 75 must bear the letter "O"; the balls must be the same size, weight, shape, and balance so that at all times during a bingo game each ball in the device has an equal opportunity of selection; the 75 balls must be available for inspection by the players before a bingo session begins to determine that all are present and meet the requirements of this section; and

(3) manufactured and preprinted bingo cards that have 25 spaces, the center of which may be a free space, arranged in five even columns headed with the letters "B," "I," "N," "G," AND "O," respectively; each set of disposable bingo cards must be consecutively numbered from the first card to the last card, or from the first sheet of disposable bingo cards to the last sheet of disposable bingo cards; each bingo card or sheet of disposable bingo cards must have printed on its face both its individual card or sheet number and the series number assigned by the manufacturer to that set of cards;

- i. *repealed 11/10/96;*
- ii. *repealed 11/10/96;*

(c) A permittee or operator may use a flashboard to display the numbers called. The flashboard must be visible to all players and must clearly indicate all numbers that have been called. If the flashboard malfunctions during a bingo session, it need not be repaired during that session, but it must be repaired before it is used in a later session.

(d) A permittee or operator may use a video camera and display for the benefit of the players and for bingo card winner verification.

(e) Electronic or computerized bingo devices are prohibited except those devices that qualify as electronic bingo paper and have been approved for use by the department.

(f) Bingo cards that may be played without the calling of balls, sometimes known as "instant bingo," are prohibited.

(g) If two or more sets of disposable bingo cards share a common series number, only one set may be played at a time at a session.

15 AAC 160.590. Conduct of bingo games.

(h) The winner of a bingo game is the first player to complete the particular arrangement of numbers on a bingo card based on balls called.

15 AAC 160.995. Definitions.

(a)(3) "electronic bingo paper" means an electronic device that replicates a traditional bingo hard card as defined in 15 AAC 160.570 (b)(3) and that is not capable of being connected to a random number generator, or of being played without the direct participation of player in a bingo game.

BACKGROUND

Millennium markets a handheld electronic unit called the BingoStar®. The BingoStar® is similar but not identical in operation to other handheld units previously authorized for gaming use in Alaska. The BingoStar® incorporates an electronic feature that allows the handheld units to receive wireless transmissions during the conduct of a bingo game. Those transmissions result in a display of the called number on the face of the machine and can inform the player of a "bingo." The BingoStar® units can be set to register an audible signal as well as a visual indicator.¹ As presently configured for use in Alaska, the BingoStar® units require a player to numerically key in numbers to mark each called number on the electronic paper being played. The player enters a number once to mark all electronic cards being played.² In response to a request for approval of the BingoStar®, the Gaming Unit issued a letter on July 23, 2001, listing conditions that would be necessary for approval. Condition number 6 was, "*The machines cannot utilize radio frequency.*" That is the restriction that Millennium questioned and the department agreed to reconsider.

¹ The BingoStar® has any number of other features, some of which have been deactivated to comply with Alaska gaming law. For example, in jurisdictions where it is allowed, the BingoStar® can be configured to automatically "catch up" missed numbers by activating a single key.

² According to a brochure of the manufacturer, the machines are capable of playing 1024 cards simultaneously.

DECISION

1) Is the use of an electronic device by a bingo player authorized under the gaming laws?

AS 05.15.180(b) clearly limits the authority of the Department of Revenue regarding the types of gaming activities that are allowed. The Department cannot add any activities to the list delineated by the Legislature. It is equally clear under the provisions of AS 05.15.180(a) that the Department has no authority to approve the use of playing cards, dice, roulette wheels, coin-operated instruments or machines designed primarily for gaming or gambling in violation of AS 05.15.180 (b) and the gambling prohibitions of AS 11.66.280(3). On the other hand, under AS 05.15.180(a) the Legislature has given the Department the authority to "expressly approve" equipment for use within the area of administration delegated by the Legislature. That area is the limited list of authorized activities which appears at AS 05.15.180(b). Acting within its limited area of authority, the Department may authorize equipment to the extent allowed by other statutory and regulatory provisions, and to the extent the proposed equipment does not so alter one of the activities listed under AS 05.15.180(b) as to constitute a new activity unapproved by the Legislature.

Alaska law prohibits the expansion of charitable gaming activities beyond a limited list of traditional activities. AS 05.15.180(b). The gaming laws also prohibit gambling instruments or machines, and prohibit any gaming instruments "*not expressly authorized by the department.*" AS 05.15.180(a). Thus, machines such as the BingoStar® are not authorized by statute and are allowed only to the extent approved by the department. Similarly, the regulations restrict bingo equipment and expressly prohibit electronic or computerized bingo devices, "*except those devices that qualify as 'electronic bingo paper' and have been approved for use by the department.*" 15 AAC 160.570(e). Qualification as electronic bingo paper is only one part of the process for a device; the department must then also approve the device for use as provided in AS 05.15.180(a). Electronic bingo paper that has not been approved by the department remains prohibited. The department reviews the specific features of each electronic bingo paper application and decides whether to approve, deny, or approve the device with conditions. The extent to which the device comports with traditional bingo as defined in AS 05.15.690(3) is considered as the predominant factor in the approval process. This is the framework within which the department will review applications by operators and permittees for approval of gaming equipment.

In summary, the use of an electronic device in a bingo game is not authorized by statute. However, a device may be approved for use in the discretion of the department if it qualifies as electronic bingo paper and meets other department criteria based upon a comparison of player participation and similar factors associated with the use of the electronic device with player participation and the other factors inherent in and associated with traditional bingo.

2) Does the regulation definition of electronic bingo paper allow the use of wireless communication?

AS 05.15.640 restricts the use of broadcasting in promoting or conducting gaming activities. Millennium is incorrect that the wireless communication employed by the BingoStar® is outside the broad scope of the broadcasting restriction. It is certainly true that AS 05.15.640 and 15 AAC 160.945 address the promotion or conduct of a charitable gaming activity through broad range transmission of radio, television or similar signals. These restrictions go to the acts of sponsoring, operating or conducting gaming activities. In the present case, Millennium is not an operator and does not promote or conduct any gaming activity. The desire of Millennium is to market a piece of bingo equipment to bingo halls for use by players. That fact, however, makes no practical difference if the operator is precluded by AS 05.15.640 from making the devices available to the players. In that case an operator would simply refuse to purchase the devices. The department must therefore look to the intended actual use by an operator or permittee of the devices as configured by Millennium to determine whether they should be approved.

The distinguishing feature of Millennium's unit that is relevant to our inquiry is that the BingoStar® is designed to make use of only low level, wireless, radio communication to aid in the playing of the game by any particular player.³ The BingoStar® uses a low frequency radio signal designed to carry only within the confines of the bingo hall.⁴ The players using handheld BingoStar® units must be present in the facility to employ the wireless feature as a game is being conducted. While AS 05.15.640 prohibits certain broadcasting, it does not necessarily prohibit the use of a wireless feature operating by radio transmission below 2500 megahertz. Nevertheless, the approval of the wireless feature is tied to and based upon all the foregoing facts and might well be different if any aspect of the facts were to change.

AS 05.15.180(b) lists bingo as one of the allowed activities that the Department shall administer. Bingo is defined at AS 05.15.690(3). That definition provides:

"bingo" means a game of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, five or more in one line, the holder covering numbers when objects similarly numbered are drawn from a receptacle, and the game being won by the person who first covers a previously designated arrangement of numbers on the card;

The regulations covering bingo appear at 15 AAC 160, Article 5, and at section 995(a)(3). 15 AAC 160.570 defines "Bingo equipment." The various subsections of section 570 provide a definition for each component of the game, from the ball mixing device to the bingo cards. Subsection (e) provides:

³ Millennium points out that the wireless feature enables the point of sales computer to more accurately data capture sales and player activity for both business management and regulatory oversight.

⁴The regulation prohibits 2500 megahertz transmissions; Millennium has represented that the BingoStar® operates at 916 megahertz.

(e) Electronic or computerized bingo devices are prohibited, except those devices that qualify as "electronic bingo paper" and have been approved for use by the department.

The definition of electronic bingo paper appears at 15 AAC 160.995(a)(3) and provides:

(2) "electronic bingo paper" means an electronic device that replicates a traditional bingo hard card as defined in 15 AAC 160.570.(b)(3) and that is not capable of being connected to a random number generator, or of being played without the direct participation of a player in a bingo game.

Under the authority of AS 05.15.180(a) and the provisions of 15 AAC 160.570, the Department has allowed bingo equipment to evolve over time. Changes allowed include video monitored ball blowers, flashboard displays, television monitors, colored daubers, and disposable bingo cards. These changes have been determined to be changes that do not alter the fundamental nature of the traditional bingo game as defined in AS 05.15.690(3), and therefore do not violate the restriction of AS 05.15.180(b).

15 AAC 160.570(e) and 15 AAC 995(a)(3) recognize the trend toward electronic bingo devices that take the place of traditional bingo hard cards. Such equipment must first fit within the regulatory definition of electronic bingo paper. That definition provides three criteria: 1) the device must replicate a traditional bingo hard card; 2) it must not be capable of connection to a random number generator; and 3) it must not be capable of being played without direct player participation. Each of these conditions has been determined to be essential to the nature of traditional bingo as defined in AS 05.15.690(3).

The BingoStar® replicates a traditional bingo hard card on its display face. However, the BingoStar® goes further to the extent that it is capable of playing multiple cards, and to this extent it begins to deviate from AS 05.15.690(3) and 15 AAC 160.995(a)(3).⁵ This is an issue outside the scope of our review as that feature was previously authorized when the BingoStar® received tentative approval on September 6, 2001 without the wireless feature. Our decision may be taken as notice, however, that the department may well reconsider the question in a future action to insure that the devices, and any other similarly existing devices, truly replicate a traditional bingo hard card.⁶ The precise decision reached today is limited to and addresses only the wireless issue, and does not decide other issues or otherwise waive the department's ability, and responsibility, to reconsider the correctness of past actions approving electronic devices.

Millennium represented that, as configured for Alaska, the BingoStar® is incapable of initiating or conducting a game and does nothing to modify the manner in which a permittee or operator performs the selection of balls, calling of numbers, or selection of game patterns. Balls must still be randomly selected by an operator from an appropriate device and the number "called" and displayed to all players. The BingoStar® is configured to prevent

⁵ By its nature, electronic bingo may allow a player to take a single action in response to each number called regardless of how many "cards" are being played. The machines are capable of automatically marking all cards. This is in contrast to traditional bingo that requires a physical response for each card.

⁶ See further discussion of this feature at page 10 of this decision.

“automatic” play. What the wireless feature of the BingoStar® would do is minimize errors for those participants who select the handheld units rather than traditional cards. The attraction for players is the transmission and display of the called number directly to the handheld unit as the flashboard is lighted. By using electronic communication to indicate to a player on the face of the unit each number that is called, the BingoStar® assists a player in minimizing input errors or missing numbers.

The wireless feature of the BingoStar® is a change to previously approved electronic devices used in place of traditional bingo hard cards under the provisions of 15 AAC 160.995(a)(3) and 15 AAC 160(e). Nevertheless, one aspect of the precise issue presented in this review - whether the BingoStar® device with its wireless communication feature may be approved for use as electronic bingo paper - is answered in the affirmative.

A wireless device that qualifies as electronic bingo paper must also be approved by the department. The department may also condition approval of the device taking into account various factors and considerations. The approval of the BingoStar® wireless communication device now raises an issue that did not exist before the authorization of the wireless communication feature. While a device is “bingo equipment” to the extent it qualifies as electronic bingo paper, and there is no express prohibition in the gaming statutes or regulations that prevents use of electronic communication to electronic bingo paper, the question that the department must now consider about the wireless feature as it effects the wireless device is the following: once the device receives the wireless electronic communication, is it capable of play by merely pushing an “Enter” key repeatedly to mark numbers? In this mode, the player could miss or ignore several calls, and merely push the “Enter” feature to catch up, all without any awareness of the specific numbers that were called. It is therefore necessary to consider this potential result in terms of its impact on the direct participation of a player in comparison to traditional bingo.

Obviously, the extent to which a player participates in a bingo game can vary where an electronic machine is involved. The department will therefore compare the degree of player involvement with a device to that with the traditional hard card. While any action might be argued to constitute direct participation, even simply powering on the device, the department retains the discretion by statute to approve or disapprove depending on the degree of participation and compliance with the definition of bingo at AS 05.15.690(3). Approval may be conditioned upon insuring a minimum degree of player participation as specified by the department.

In traditionally played bingo, a player would physically “cover” a number by placing a coin, paper marker or dry bean on the appropriate numbered space on a bingo paper card. Bingo cards were not defaced because they would be reused in other games. Properly playing the game required that each player remain alert to the progress of the game, ascertain each specific number called and take some action to respond to each individually called number. A player would watch and listen as a ball was drawn and a number called and then determine whether that number was listed on the player's bingo card; if it was found on the card the

player would then cover the space with a marker and remain alert to announce a bingo. These features are the "direct participation of a player" inherent in traditional bingo.

As bingo equipment changed over time, the use of hard marker pieces disappeared and players began using marking pens or pencils and disposable hard cards. "Covering" a space was accomplished by marking it with a pen or pencil. That eventually evolved into the wide-tipped, bright-colored "daubers" commonly in use for marking bingo spaces today. The level of player participation remained unchanged with the use of the daubers and disposable cards.

With the technological advances of recent years, the gaming industry has seen a trend toward electronic devices into which bingo game cards are electronically "loaded" at purchase and the player marks or "covers" called numbers by data entry, or in some cases by merely touching the appropriately numbered space on a display screen. The extent to which Alaska has recognized this technology is in 15 AAC 160.995(a)(3), the definition of electronic bingo paper. A player must still monitor the on-going progress of the game, ascertain what actual numbers have been called, and take some action to mark each specific number. "Direct participation of a player" requires more than merely a physical action by the player. It requires that a player participate in the game by having knowledge of actual numbers called and then taking physical action to mark or cover those specific numbers. While virtually all devices arguably require player participation to some degree, it is only those devices that require player participation reasonably equivalent to traditional bingo that will be approved by the department.

If called numbers are electronically communicated to bingo gaming devices, 15 AAC 160.995(a)(3) requires that the devices be configured so that a player is still required to directly participate in the game. Answering our earlier question, the device may not use an "Enter" key alone to mark numbers. Such a feature would enable a player to mark numbers by merely pressing an "Enter" key repeatedly without the need for actual knowledge of what numbers had been called. Use of an "Enter" key would also allow a player to press "Enter" each time a number is called, without any requirement to take specific action particular to the actual number called. A player's use of such features would not constitute a sufficient degree of direct participation in the bingo game. To play numbers, correct errors, or catch up missed numbers, the precise numbers must be numerically keyed in, or separately marked by a touch on the display, to indicate the player's recognition of and response to the called numbers.

Another questionable feature involves the highlighting of called numbers electronically on the display face of what is ostensibly electronic bingo paper. A highlighting feature would appear to obviate the requirement that a player follow the game, have knowledge of what numbers have been called, and recognize a winning bingo combination. Highlighting is not available to players of traditional hard cards and is not part of traditional bingo. To the extent that a feature of an electronic device is inconsistent with traditional player participation, the device may not qualify as electronic bingo paper. While not an issue in this review, the

department may revisit the entire issue of electronic bingo paper, including the issue of a "highlighting" feature for called numbers by wire or wireless communication.⁷

Further, the department may reconsider prior approval of devices that play multiple cards at the same time. 15 AAC 160.995(3) defines electronic bingo paper to mean an electronic device that replicates a hard card, not multiple cards. It would appear to be a requirement that a player must play each card individually and may not utilize a device that marks multiple cards based upon one input from the player. Traditional bingo requires player participation with each card, and the department should scrutinize alleged electronic bingo paper in that context. A device may contain multiple cards, but it would also appear that the device must require the player to take individual action with each card. The appeals officer recognizes that there are devices currently in use that allow multiple cards to be played at one time based upon one input. That Gaming Unit approval was previously granted to such machines with this capability may be an error to be addressed by the department in the future in some other action. That precise issue is beyond the scope of this review as the Gaming Unit has otherwise previously approved that feature of the BingoStar® and has not yet acted to revoke authorization for all similar devices.

Also not an issue is whether the Americans with Disabilities Act (ADA) applies to expand the definition of electronic bingo paper and require it to be applied to all players. We mention it here only to respond to the assertion that it constrains the authority of the department to preclude the use of gaming devices. Millennium at one point asserted that the ADA prohibits a bingo hall operator from discriminating against any individual in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or other accommodations of the facility. That may be true, but it is not relevant. The state is not a bingo hall operator. Nor has Millennium shown that the state, being neither an operator nor building owner, is required to authorize gambling devices under the scope of the ADA. In its presentation that the BingoStar® aids compliance with the ADA and ASHRA, Millennium advanced two different features: 1) full use of the automatic daubing feature would assist severely disabled players; and 2) wireless communication with auditory tones aids disabled players. Nevertheless, there is no standing or other basis to assert the ADA in the context of this review.

Nor does Millennium seek on behalf of the disabled to make special machines available only to the disabled on demand. Instead, Millennium asks the department to approve carte blanche features on all machines on the rather transparent argument that these features would aid the disabled. Therefore, Millennium is not arguing for a reasonable accommodation on behalf of disabled players under the ADA. Millennium is simply seeking as a vendor to provide its machines to bingo halls to be used by the general population of bingo players. The ADA simply does not apply.

⁷ This feature may be present in previously approved devices that do not involve wireless communication to the extent they "highlight", notify, or prompt a player that entry of the last number achieved a bingo. The electronic transmission and the highlighting of numbers is different than the transmission by wire or wireless to the large bingo hall flashboards. In the case of the individual player units, the transmission reveals a specific number that requires marking; flashboards merely convey numbers called to all players in the hall.

Lastly, unlike many challenges brought under the ADA that contest private or public barriers alleged to discriminate against the disabled, here Millennium seeks what would amount to an exemption from Alaska criminal provisions. Under Title 11, Chapter 66, Alaska defines gambling as criminal activity. While Alaska statutes create limited exemptions to the gambling prohibition for charitable gaming activities, it does not approve otherwise illegal gambling devices. AS 05.15.180(a). Nor does the ADA.

The ADA does not require the legalization of gaming devices that would otherwise be illegal gambling devices. Millennium should recognize that the state has taken other steps to remove barriers to the disabled. See 15 AAC 160.590(b) regarding the use of braille bingo cards. But the heart of the matter is that neither the ADA nor the Alaska State Human Rights Act requires the approval of otherwise illegal gaming devices.

CONCLUSION

The Gaming Unit's action to restrict the use of wireless communication associated with approved electronic bingo paper to those uses that comport with traditional bingo is reasonable. However, the transmission of bingo called number data by wire or wireless to an electronic device is not per se proscribed provided such transmissions are not prohibited broadcasting and are made to an electronic bingo paper device approved by the department. State authorized persons conducting permitted bingo games under AS 05 may utilize the wireless communication feature of the previously approved BingoStar® devices.

IMPORTANT NOTE: Operators and permittees that utilize electronic bingo paper must maintain a listing of the serial numbers for all approved devices, and provide the listing to the Gaming Unit before the devices are used. Only those devices as initially approved and verified by serial number may be used in gaming activities. Further, any software or other changes whatsoever to the device must be approved by the Gaming Unit prior to use in gaming activities. The Gaming Unit must be notified upon the retirement of particular devices and the serial number of the retired device must be identified. Replacement devices also must first be approved and the serial numbers provided to the Gaming Unit.

Dated this 13th day of December, 2001, at Anchorage, Alaska.


Brian Timblin
Appeals Officer